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SUMMARY AS OF MARCH 10, 2022 OF EU AND UK SANCTIONS IN REACTION TO THE WAR IN UKRAINE - PRACTICAL RECOMMENDATIONS FOR PENDING CONTRACTS

| 10/03/22 | Marie Danis Olivier Attias

EU Sanctions

A **first package of sanctions** endorsed by the EU Council on 23 February via 4 decisions[1] and 5 regulations[2] introduced targeted freezing of assets and economic resources against nearly 400 natural and legal persons and measures significantly restricting trade activities between the EU and the Donbass regions.

A **second set of sanctions** adopted on 25 February[3] completed the list of those subject to targeted measures and, above all, drastically limited trade operations between the European Union and Russia as a whole, adding to those adopted in 2014 in response to the illegal annexation of Crimea and Sevastopol.

On 28 February, a **third package of sanctions** was issued by the EU Council to add some 20 additional individuals to the list of targeted measures[4], including a ban on the overflight of Russian-owned aircraft.[5]

An additional list of 22 individuals was published on 2 March to be added to the list of those targeted. On the same day, the EU Council also decided to extend sanctions to certain activities with **Belarus** following its involvement in the Russian military aggression against Ukraine.[6]

On March 9, the EU Council added 14 oligarchs belonging to the most influential circle of Russian businessmen with close ties to the Russian government, but above all who are active in economic sectors that constitute a substantial source of income for the Russian government, as well as 146 members of the Council of the Russian Federation to the list of persons subject to measures to freeze their funds and economic resources.[7]

On the same day, sectoral sanctions against Russia and Belarus were extended. The former to extend export controls to maritime navigation goods and technologies;[8] the latter to strengthen, in a similar way to those adopted the previous week against Russia, the existing financial restrictions, by targeting the Central Bank of Belarus.[9]

☐ To date, the sanctions adopted by the European Union can be summarized as follows:

- Freezing the assets and resources of over 900 Russian individuals

The EU has imposed numerous measures to freeze assets and economic resources and, therefore, prohibit making funds or resources directly or indirectly available to over 700 Russian natural and legal persons:

- Responsible for actions or policies threatening the territorial integrity of Ukraine (including all deputies of the Russian Duma, President Putin, numerous ministers, members of the Russian National Security Council and military officials);
- Providing material or financial support to actions threatening the sovereignty and independence of Ukraine, or to the Russian government and decision-makers responsible for the annexation of Crimea and the Donbass region (including Promsvyazbank, Vnesheconombank VEB.RF and Bank Rossiya);
- Conducting transactions with separatist groups in Donbass;
- Operating in economic sectors that provide a significant source of income to the Russian government (influential businessmen and women, oligarchs and directors of state-owned enterprises) such as the presidents and founders of important industrial groups (EuroChem, Rostelecom, Aeroflot, Rusnano, Sibur, etc.).

The consolidated list of these persons is included in the National Asset Freeze Register maintained and updated by the French Treasury's General Directorate which can be found [here](#).

As a practical consequence, the freezing order means that it is prohibited for any EU person to make funds or economic resources available, directly or indirectly, to or for the benefit of these individuals and legal persons, or individuals and entities associated with them.





- Ban on the export and sale of certain products in Russia

This prohibition concerns the sale, supply and direct or indirect export of the following goods and technologies to any natural or legal person, regardless of nationality, who is in Russia or for use in Russia:

- Dual-use goods and technologies;
- Goods and technology which could contribute to the military and technological strengthening of Russia or to the development of the defence and security sector, as listed in Annex VI to Regulation (EU) 2022/328 ;
- Goods and technologies suitable for use in oil refining as listed in Annex IX of Regulation (EU) 2022/328;
- Goods and technology suitable for use in the aviation or space industry as listed in Annex X of Regulation (EU) 2022/328;
- Maritime navigation goods and technology, as listed in Annex IV of Regulation (EU) 2022/394.

Note that these prohibitions mostly extend to the **provision of related services** such as the provision of insurance and reinsurance, maintenance and technical assistance, or financing and financial assistance.

- Ban on all transactions with the Central Bank of Russia and on certain transactions with the Central Bank of Belarus

- Ban on certain financial transactions with Russia and Belarus

The transactions affected by the prohibition measures are the direct or indirect purchase, sale, provision of investment services or assistance in issuing securities and money market instruments issued after 12 April 2022 and which could contribute to strengthening the Russian economy.

Additionally, further measures were adopted regarding Belarus in order to significantly limit financial flows with the EU, by prohibiting:

- the acceptance of deposits of more than EUR 100,000 from Belarusian nationals or residents,
- the holding of accounts of Belarusian customers by EU central securities depositories, and
- the provision of euro-denominated securities to Belarusian customers.

Note that on March 9, the EU Council clarified the scope of the financial restrictive measures by confirming that **they shall also apply to transactions involving crypto-assets**.

- Bans on trade with Donbass


These sectoral bans are similar to those imposed by the EU in 2014 following the annexation of Crimea and concern:

- the export of certain goods and technologies that may be used in the transport, telecommunications, energy or oil, gas and mining prospecting, exploration and production sectors;
- the import of goods (for contracts concluded before 23 February 2022, this ban will take effect on 24 May 2022);
- making new financial or real estate investments; and
- the provision of tourism services.

- Bans affecting European airspace

These sanctions, which are primarily binding on the national authorities responsible for the regulation and supervision of air transport and aviation activities in general, prohibit the landing, take-off and overflight of all EU territory by:

- Russian air carriers ;

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- Russian-registered aircraft;
 - aircraft not registered in Russia but owned, chartered or controlled by a Russian person.

- Prohibitions affecting trade with Belarus

The sanctions adopted by the EU on 2 March 2022 extend the scope of certain restrictive measures in force since June 2021 and introduce new restrictions. It is now prohibited to:

- to sell, supply, transfer or export, directly or indirectly, dual-use goods and technology in Belarus or for use in Belarus, irrespective of the use made of them;
- to sell, supply, transfer or export, directly or indirectly, goods and technology which could contribute to the military and technological development of Belarus or to the development of the defence and security sector, as listed in Annex II to Regulation (EU) 2022/355 ;
- import into the EU, directly or indirectly, wood, cement, steel or rubber products originating in or exported from Belarus;
- to sell, supply, transfer or export, directly or indirectly, certain machinery (steam, turbine, nuclear, etc.) to Belarus; the precise list of which is set out in Annex XII of Regulation (EU) 2022/355.

In addition, the bans on the sale and export of goods used for the production and manufacture of tobacco products, as well as the purchase and import of mineral and petroleum products, and potassium chloride ("potash") products, have been extended in accordance with the lists specified in Annexes V, VI and VII respectively of Regulation (EU) 2022/355.

- SWIFT network

The European Commission, France, Germany, Italy, the United Kingdom, Canada and the United States have agreed to exclude 7 Russian banks from the SWIFT messaging system in order to further disconnect them from the international financial system[10]:

- Bank Rossiya, Promsvyazbank and Vnesheconombank VEB (already subject to targeted measures by the EU);
- VTB Bank, Bank Otkritie, Novikombank and Sovcombank.

Similar provisions are to be applied to the following Belarus banks as well as their Belarusian subsidiaries as of March 20:

- Belagroprombank,
- Bank Dabrabyt, and
- the Development Bank of the Republic of Belarus.

□ What are the actual consequences for the activities of subsidiaries of European companies?

As a reminder, the sanctions adopted by the EU are applicable to:

- To all natural persons who are nationals of a Member State or who are on the territory of one of these States;
- To all legal persons registered in a Member State or operating from the territory of one of these States.

In France, contravening or attempting to contravene the European sanctions is subject to **criminal penalties** incurred by natural and legal persons (Article 459-1 bis of the [French] Customs Code).

These penalties can be **up to five years' imprisonment** and a **fine** equal to at least the amount and up to twice the amount (ten times the amount for legal persons) of the sum to which the offence relates; and may be accompanied by additional penalties such as exclusion from public contracts, disqualification, etc.

UK Sanctions



The UK Treasury updated its 2020 statutory guidance to assist in the implementation of and compliance with the Russia Sanctions, which provides useful advice and clarifications on the prohibitions and requirements imposed by the different restrictive measures. It should be emphasized that UK Government is in the process of adopting an Economic Crime Bill to be allowed to “*move further and faster than ever on sanctions*”.[11]

Among the restrictions that have been adopted by the UK authorities since the beginning of the Ukraine war, the following are to be noted:[12]

- Financial sector restrictions targeting **major Russian banks and the Central Bank of Russia**
- **Individual sanctions targeting over 200 individuals and companies**

Individual sanctions have been imposed on more than 144 people and 64 companies, including defence and high-tech company Rostec and oligarchs Kirill Shamalov, formerly married to Putin's daughter, Pyotr Fradkov, head of Promsvyazbank, deputy chairman of VTB bank, Denis Bortnikov, head of United Aircraft Corporation, Yury Slyusar, and Elena Georgieva, chairwoman of the board of Novikombank, which finances Rostec.

On March 10, UK added 7 oligarchs including the owner of Chelsea FC Roman Abramovich and other members of Putin's inner circle to the list of persons targeted with asset freeze and travel ban.

The consolidated list of financial targets related to Russia in the UK is regularly updated by the Treasury and is publicly available here.

- **Ban on the export of certain goods**

Export licenses were suspended for certain goods and services to Russia. Regarding technologies, a ban on a wide range of technology exports to Russia has been adopted by the UK, targeting notably:

- Military goods and technology,
- Dual-use goods and technology,
- Energy-related goods and services,
- Aviation and space goods and technology,
- Infrastructure-related goods.

In a manner similar to the EU prohibition, the provision of technical assistance and financial services in relation with the abovementioned products may also be restricted.

- **Shipping and aircraft sanctions**

UK prohibited Russian ships, and other ships specified by the Secretary of State, from entering ports. This means that the following ships are banned from accessing UK by sea:

- Ships that are owned, controlled, chartered, or operated by a sanctioned person or persons connected with Russia,
- Ships that are registered in Russia, and
- Ships flying the Russian flag.

Similarly, aircraft sanctions prohibit Russian aircrafts which are owned, chartered or operated by persons connected with Russia or designated persons from operating in UK airspace or landing and taking off in the UK.

- **Sanctions targeting Belarus**

The UK Government also declared it would impose further sanctions on Belarus for its role in the conflict. Among the individuals and entities already sanctioned by asset freeze and other restrictive measures are:

- Belarusian Deputy Defence Minister Major General Victor Gulevich, who is "responsible for directing the actions of the Belarusian armed forces".
- Major General Andrei Burdyko, Head of Logistics, Major General Sergei Simonenko, Head of Armaments, and Major General Andrey Zhuk, Deputy Minister of Defence of Belarus.

- Also sanctioned are JSC Integral, a military semiconductor manufacturer, and JSC 558 Aircraft Repair Plant, which maintains and services military aircraft at an airbase from which Russian aircraft operated. [13]

Practical recommendations for ongoing contracts affected by the current international sanctions

❑ The application of *force majeure* under French law if the performance of a contract is made impossible

In view of the above, and in the absence of a real transitional period in the implementation of the sanctions mentioned above, many French companies having contractual relations with Russian counterparties may find themselves unable to perform their contractual obligations and potentially be held liable.

The first defense that comes to mind here - and rightly so - is the invocation of *force majeure* by the French co-contractor since this concept presupposes those three conditions are met:

1. unpredictability (the event "*could not reasonably have been foreseen at the time of the conclusion of the contract*"),
2. externality (the performance of the obligation is prevented by "*an event beyond the control of the debtor*"), and
3. irresistibility ("*the effects cannot be avoided by appropriate measures*").[14]

Though a French company that finds itself unable to perform an agreement due to the application of economic sanctions (because they affect either its activities or the other party to the contract) may usefully invoke *force majeure* to suspend performance of its agreement, it should be noted that the person directly subject to an asset-freeze measure is not however entitled to plead the *force majeure* for not fulfilling its contractual obligation; the French *Cour de cassation* considered in 2020 that there was no external factor in the restrictive measure.[15]

Please note however that the reference to the classic events defining *force majeure* may be insufficient if the continuation of the contract is not strictly speaking prohibited or restricted by the evolution of international sanctions. This could be the case if the counterparty has been designated on a US sanctions list to which the French company is not, in principle, directly subject, or because the adoption of sectoral or local restrictive measures would make banks reluctant to carry out transactions in connection with the region concerned.

To ease the recognition of *force majeure* cases in similar scenarios, it is highly recommended to arrange the definition of the relevant regime in the terms of the agreement. Indeed, depending on the level of risk identified for the activities covered by the contract (for example, when they are linked to a country where the diplomatic situation is unstable or a conflict zone), it may be useful to anticipate the possibility that commercial operations may be subject to restrictions during the performance of the contract.

We therefore recommend **including a specific reference to international sanctions** in the contractual definition of *force majeure*, with a presumption that all three conditions are met unless the other party proves otherwise, to avoid any debate on the continuation of the contract and to allow for the possibility of suspending its performance.

It is also advisable to encompass the consequences of *force majeure* on contracts (relief from a duty to perform, merely suspension, limitation of liability, etc.). If a *force majeure* event relieves a party from the duty to perform its obligations, it does not entitle the other party to claim for the extra-costs sustained or damages suffered as a consequence.


On a last note, the French party should ensure that it **notifies its co-contractor without delay of the event of *force majeure***, as is most often provided for in the contract, otherwise it risks losing the benefit of this possibility of suspending the contract without the risk of being held liable.

❑ What if the contract is still enforceable but its cost becomes too onerous?

Under French law, the concept of unforeseeability (hardship) involves contracts of long duration that undergo a change in circumstances such that it makes performance excessively onerous for one party.

Article 1195 of the Civil Code authorizes a party to pursue a procedure that may lead to a revision of the contract when four conditions are met:



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1. there must be a change in circumstances,
 2. which was unforeseeable at the time of the conclusion of the contract,
 3. making performance of the contract excessively onerous,
 4. for a party to the contract who had not agreed to assume the risk of unforeseeability.

In several instances the contract will expressly waive the French legal regime of hardship. But if the contract is silent, a party may try to rely on article 1195 to try to renegotiate its obligations. Since the **change in circumstances** may result from legal, economic, political, monetary, social or technological circumstances, it includes the adoption of international economic sanctions. Moreover, it is likely that there would be very little argument supporting the predictability of the current armed conflict and the sanctions that resulted if the contract was signed before the first announcements made by the EU. In fact, in order to assess **unpredictability**, French judges focus on criteria such as abnormality, suddenness, or rarity, which could be considered as great adjectives to the current situation.

As for the **acceptance of the risk**, it should be recalled that if one of the parties, when concluding the contract, has deliberately accepted to assume the economic risk linked to a possible later change in the circumstances of the performance of the contract, it will be difficult to challenge its actual realization and request the renegotiation of the contract.

Finally, with respect to performance that has **become excessively onerous** for one of the parties, it is understood that performance must not simply be made more difficult but must have become excessively onerous for the party who suffers the change in circumstances. It is not necessary, on the other hand, that such performance should now be impossible. Such an assumption would in fact fall within the scope of force majeure.

If the above conditions are met, the contracting party who is the victim of the change in circumstances should ask his co-contractor to **renegotiate the contract**; however such request does not automatically result in the suspension of the contract. Please note that if renegotiation fails, the French Civil Code allows the parties to seek an agreement to **rescind the contract** or to ask the court, by mutual agreement, to **adapt it**.

Where the parties are unable to reach agreement after a reasonable period, one of them is entitled to ask the judge to **revise the contract or to terminate it**, on the date and under the conditions that the judge determines.

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[1] Council Decision (CFSP) 2022/264 of 23 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; Council Decisions 2022/265 and 2022/267 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of acts undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; 2022/266 of 23 February 2022 concerning restrictive measures in response to the recognition of the areas of the Donetsk and Luhansk oblasts of Ukraine not under the control of the Government and to the order given to the Russian armed forces in those areas

[2] Council Regulation (EU) 2022/259 of 23 February 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Council Implementing Regulation (EU) 2022/260 of 23 February 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

[3] Council Decisions (CFSP) 2022/327 of 25 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in respect of acts of Russia destabilising the situation in Ukraine; 2022/329 and 2022/331 of 25 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of acts undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Council Decision 2022/333 of 25 February 2022 on the partial suspension of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to citizens of the European Union and the Russian Federation;



Council Regulation (EU) 2022/328 of 25 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in respect of acts of Russia destabilising the situation in Ukraine; Council Regulation (EU) 2022/330 of 25 February 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of acts undermining or threatening the territorial integrity, sovereignty and independence of Ukraine;

[4] Council Implementing Regulation (EU) 2022/336 of 28 February 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures with regard to actions endangering or threatening the territorial integrity, sovereignty and independence of Ukraine

[5] Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures with regard to destabilising actions by Russia in Ukraine, Article 1.

[6] Council Regulation (EU) 2022/355 of 2 March 2022 amending Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus

[7] Council Implementing Regulation (EU) 2022/396 of 9 March 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

[8] Council Regulation (EU) 2022/394 of 9 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

[9] Council Regulation (EU) 2022/398 of 9 March 2022 amending Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine

[10] European Commission – Statement, Joint Statement on further restrictive economic measures, Brussels, 26 February 2022.

[11] UK Government press release of 10 March 2022.

[12] https://www.legislation.gov.uk/ukxi/2022/194/pdfs/ukxi_20220194_en.pdf

[13] <https://www.gov.uk/government/news/uk-imposes-sanctions-on-belarus-for-its-role-in-the-russian-invasion-of-ukraine>

[14] Definition provided for by Article 1218 of the French Civil Code, applicable if the contract is subject to French law, it being specified that most laws have the same assessment of the notion of force majeure.

[15] Cass., plenary session, 10 July 2020, P+B+R+I, n° 18-18.542 and 18-21.814.
